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NOT TO BE PUBLISHED

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Placer)

CCF HOLDINGS, INC., et al., Plaintiffs and Respondents, v. TERRY L. GILBEAU, Defendant and Appellant.	C086948 (Super. Ct. No. SCV0040278)

In 2014, plaintiffs CCF Holdings, Inc., and Thomas Heffernan (collectively "CCF Holdings") obtained a judgment against Donald F. Gaube in excess of $15,000,000. Several years later, plaintiffs filed the underlying action against defendant Terry L. Gilbeau, alleging a cause of action for breach of fiduciary duty arising out of Gilbeau's professional representation of Gaube in a bankruptcy adversary proceeding.

Gilbeau now appeals from the order denying his special motion to strike the complaint under Code of Civil Procedure section 425.16,[1] commonly referred to as the anti-SLAPP statute.[2] We affirm the trial court's order.

FACTUAL AND PROCEDURAL BACKGROUND

In June 2014, CCF Holdings obtained a judgment in the Contra Costa Superior Court against Gaube in the amount of $15,724,660.27. Gilbeau represented Gaube in that action, which arose out of a dispute related to Classico Foods, LLC, a company in which Gaube and others had substantial investments.

Based on an alleged guaranty/agreement, Gaube claimed that certain third parties—"Class A Investors" in Classico Foods, LLC (hereafter "investors")—were liable for the amount of the judgment under an indemnity or contribution theory. Gaube, however, never filed a cause of action against these parties.

After the entry of judgment, Gaube and CCF Holdings entered into a forbearance agreement. Thereafter, Gaube breached the agreement and threatened to initiate bankruptcy proceedings. In doing so, Gaube represented in writing that he would do everything in his power to see that CCF Holdings "did not get a dime."

In December 2015, Gaube filed a Chapter 11 bankruptcy petition in the Northern District of California. Gilbeau did not represent Gaube in that action. Rather, Gaube was represented by two other attorneys, including John MacConaghy. CCF Holdings was the largest creditor of Gaube's bankruptcy estate.

In June 2016, MacConaghy filed an adversary proceeding against the investors, seeking damages and declaratory relief based on contribution and indemnity theories. Although Gilbeau had previously advised Gaube in writing that any claims against the

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[1] Undesignated statutory references are to the Code of Civil Procedure.

[2] "SLAPP is an acronym for 'strategic lawsuit against public participation.' " (*Jarrow Formulas, Inc. v. LaMarche* (2003) 31 Cal.4th 728, 732, fn. 1.)

investors for indemnity/contribution were highly problematic due to the lack of any signed guarantees and a statute of frauds defense, he nonetheless agreed to represent Gaube in the adversary proceeding.

In July 2016, MacConaghy filed a motion in the bankruptcy court requesting authority to employ Gilbeau as special counsel for the estate to represent Gaube in the adversary proceeding pursuant to a written fee agreement. The motion noted that approval of the fee agreement, which provided for a $100,000 retainer to Gilbeau, plus a percentage of any recovery obtained against the investors, would be sought "through [Gaube's] pending Plan of Reorganization."

In October 2016, the bankruptcy court issued an order confirming Gaube's plan of reorganization. On that same date, the court issued an order authorizing the appointment of Gilbeau as special counsel and payment of a retainer in the amount of $100,000.

After very little discovery and only one deposition, the federal judge presiding over the adversary proceeding suggested that the investors file a motion for summary judgment based on the statute of frauds. Thereafter, Gilbeau dismissed the adversary proceeding with prejudice in exchange for a waiver of costs. No portion of the $100,000 retainer was returned to the estate. According to CCF Holdings, this money was "about the last available asset of [Gaube]" and would have been payable to it in whole or in large part to satisfy a portion of the judgment against Gaube.

In November 2017, CCF Holdings filed the underlying action against Gaube and Gilbeau in Placer County Superior Court, alleging a cause of action for breach of fiduciary duty. CCF Holdings's verified complaint alleges that the action was brought "as a derivative action by way of a creditor's suit pursuant to California Code of Civil Procedure § 708.210 and by reason of a debtor's examination lien granted by the Contra Costa County Superior Court in the case in which the Judgment was entered, which lien

was extended until such time as the Judgment was collected in full."[3] CCF Holdings notes that Gaube was sued "solely for purposes of compliance with CCP § 708.220,"[4] and that "no affirmative relief of any kind is being sought against [him]."

In support of its breach of fiduciary duty cause of action, CCF Holdings alleges that Gilbeau owed Gaube a fiduciary duty as his attorney, and that Gilbeau breached that duty by agreeing to accept $100,000 to represent Gaube in the adversary proceeding when he knew the lawsuit had no merit due to a statute of frauds defense. According to CCF Holdings, Gilbeau billed nowhere near $100,000 for his services. CCF Holdings seeks damages against Gilbeau in the amount of $100,000, plus interest, and punitive damages.

In December 2017, Gilbeau filed a special motion to strike the complaint, arguing that CCF Holdings's lawsuit seeks to chill his right to petition on behalf of a client, as it seeks "to fix liability" against him based on his activities in petitioning the bankruptcy court to approve payment of a $100,000 retainer to pursue the adversary proceeding. Gilbeau further argued that CCF Holdings cannot establish that there is a probability that it will prevail on its breach of fiduciary duty cause of action because it is barred due to a lack of jurisdiction, judicial estoppel, the litigation privilege, and the *Noerr-Pennington* doctrine.

CCF Holdings filed a written opposition, arguing that an attorney's breach of fiduciary duties to his client is not protected activity under the anti-SLAPP statute, and that, in any event, Gilbeau did not engage in any protected activity because Gaube's bankruptcy attorney, not Gilbeau, filed the motion seeking authorization for Gilbeau to

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3 Section 708.210 provides: "If a third person has possession or control of property in which the judgment debtor has an interest or is indebted to the judgment debtor, the judgment creditor may bring an action against the third person to have the interest or debt applied to the satisfaction of the money judgment."

4 Section 708.220 provides, in relevant part: "The judgment debtor shall be joined in an action brought pursuant to this article but is not an indispensable party. . . ."

litigate the adversary proceeding. In addition, CCF Holdings argued that the court had jurisdiction over the case, and that the litigation privilege, judicial estoppel, and the *Noerr-Pennington*[5] doctrine do not apply.

After hearing oral argument, the trial court denied Gilbeau's special motion to strike. In a detailed written order, the court found that CCF Holdings's breach of fiduciary cause of action does not arise from activity protected under the anti-SLAPP statute. This timely appeal followed.

DISCUSSION

1.0 Applicable Law and Standard of Review

"A SLAPP is a civil lawsuit that is aimed at preventing citizens from exercising their political rights or punishing those who have done so. ' "While SLAPP suits masquerade as ordinary lawsuits . . . , they are generally meritless suits brought primarily to chill the exercise of free speech or petition rights by the threat of severe economic sanctions . . . and not to vindicate a legally cognizable right." ' [Citation.]" (*Simpson Strong–Tie Co., Inc. v. Gore* (2010) 49 Cal.4th 12, 21.) The Legislature enacted the anti-SLAPP statute to prevent and deter "lawsuits brought primarily to chill the valid exercise of the constitutional rights of freedom of speech and petition for the redress of grievances." (§ 425.16, subd. (a); *Varian Medical Systems, Inc. v. Delfino* (2005) 35 Cal.4th 180, 192 (*Varian*).) The statute provides that "[a] cause of action against a person arising from any act of that person in furtherance of the person's right of petition or free speech . . . shall be subject to a special motion to strike, unless the court determines . . . there is a probability that the plaintiff will prevail on the claim." (§ 425.16, subd. (b)(1).)

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[5] *Eastern R.R. Presidents Conference v. Noerr Motor Freight* (1961) 365 U.S. 127 [5 L.Ed.2d 464] and *United Mine Workers v. Pennington* (1965) 381 U.S. 657 [14 L.Ed.2d 626].

SLAPP suits may be disposed of summarily by a special motion to strike under section 425.16, commonly known as an "anti-SLAPP motion," which is "a procedure where the trial court evaluates the merits of the lawsuit using a summary-judgment-like procedure at an early stage of the litigation." (*Varian*, *supra*, 35 Cal.4th at p. 192.) In ruling on an anti-SLAPP motion, the trial court engages in a two-step process. First, the defendant must establish that the challenged claim arises from activity protected by the anti-SLAPP statute. If the defendant makes the required showing, the burden shifts to the plaintiff to demonstrate the merit of the claim by establishing a probability of success. (*Baral v. Schnitt* (2016) 1 Cal.5th 376, 384.) Only a claim that satisfies both parts of the anti-SLAPP statute—i.e., that arises from protected speech or petitioning and lacks even minimal merit—is a SLAPP, subject to being stricken under the statute. (*Navellier v. Sletten* (2002) 29 Cal.4th 82, 89.)

"A defendant meets his or her burden on the first step of the anti-SLAPP analysis by demonstrating the acts underlying the plaintiff's cause of action fall within one of the four categories spelled out in section 425.16, subdivision (e). [Citations.]" (*Collier v. Harris* (2015) 240 Cal.App.4th 41, 50-51.) As relevant here, that subdivision defines the statutory phrase " 'act in furtherance of a person's right of petition or free speech under the United States or California Constitution in connection with a public issue' " to include "any written or oral statement or writing made before a legislative, executive, or judicial proceeding, or any other official proceeding authorized by law." (§ 425.16, subd. (e)(1).)

"The sole inquiry under the first prong of the anti-SLAPP statute is whether the plaintiff's claims arise from protected speech or petitioning activity. [Citation.]" (*Castleman v. Sagaser* (2013) 216 Cal.App.4th 481, 490 (*Castleman*).) The critical point to establishing the "arising from" requirement is whether a claim itself was *based on* an act in furtherance of the defendant's right of petition or free speech. (*City of Cotati v. Cashman* (2002) 29 Cal.4th 69, 78; *Peregrine Funding, Inc. v. Sheppard Mullin Richter*

& Hampton LLP (2005) 133 Cal.App.4th 658, 670 (*Peregrine Funding*).) "In other words, 'the defendant's act underlying the plaintiff's cause of action must *itself* have been an act in furtherance of the right of petition or free speech. [Citation.]' [Citation.]" (*Peregrine Funding*, at p. 670.)

"A cause of action does not 'arise from' protected activity simply because it is filed after protected activity took place. [Citation.] Nor does the fact '[t]hat a cause of action arguably may have been triggered by protected activity' necessarily entail that it arises from such activity. [Citation.] The trial court must instead focus on the substance of the plaintiff's lawsuit in analyzing the first prong of a special motion to strike. [Citation.]" (*Peregrine Funding*, *supra*, 133 Cal.App.4th at p. 669; see *Freeman v. Schack* (2007) 154 Cal.App.4th 719, 727 [" 'when the allegations referring to arguably protected activity are only incidental to a cause of action based essentially on nonprotected activity, collateral allusions to protected activity should not subject the cause of action to the anti-SLAPP statute' "].)

We review the trial court's ruling on an anti-SLAPP statute de novo. (*Flatley v. Mauro* (2006) 39 Cal.4th 299, 325 (*Flatley*).) "Thus, our review is conducted in the same manner as the trial court in considering an anti-SLAPP motion." (*Paulus v. Bob Lynch Ford, Inc.* (2006) 139 Cal.App.4th 659, 672.) We accept as true the plaintiff's pleaded facts and evidence favorable to the plaintiff. (*Flatley*, at p. 325; see *Dible v. Haight Ashbury Free Clinics, Inc.* (2009) 170 Cal.App.4th 843, 849 [in reviewing an order denying an anti-SLAPP motion, we primarily review the complaint; however, we also review papers filed in connection with the motion to the extent that they might give meaning to the words in the complaint].) To satisfy his or her burden at the first step, the defendant must make a prima facie showing that his or her alleged actions fall within the ambit of the anti-SLAPP statute. (*Flatley*, at p. 317.)

2.0 Analysis

We conclude the trial court properly denied Gilbeau's special motion to strike. Contrary to Gilbeau's contention, CCF Holdings's breach of fiduciary duty cause of action does not arise from protected petitioning activity. The allegedly wrongful activity underlying the claim is not Gaube's motion in the bankruptcy court requesting the appointment of Gilbeau to represent him in the adversary proceeding against the investors. Rather, the activity that gave rise to the claim was Gilbeau's acceptance of a significant fee to represent Gaube in the adversary proceeding when Gilbeau knew that any claim against the investors for indemnity or contribution lacked merit due to a statute of frauds defense. According to CCF Holdings, the fee accepted by Gilbeau was one of Gaube's "last available asset[s]," and Gilbeau, in accepting the fee and performing nowhere near enough work to justify the fee, willfully and fraudulently assisted Gaube in preventing CCF Holdings from recovering the asset to satisfy the judgment against Gaube. As the trial court correctly found, the petitioning activity in the bankruptcy court (i.e., the motion to appoint Gilbeau to represent Gaube in the adversary proceeding) and the court's order granting the motion were merely incidental to the unprotected activity that provides the basis for CCF Holdings's claim. The specific acts of wrongdoing alleged in the complaint are not activities protected under the anti-SLAPP statute. The basis of CCF Holdings's claim is that Gilbeau engaged in nonpetitioning activity inconsistent with his fiduciary obligations to Gaube. Such conduct is not protected activity under the anti-SLAPP statute. (See *Castleman, supra,* 216 Cal.App.4th at p. 491 ["A growing body of case law holds that actions based on an attorney's breach of professional and ethical duties owed to a client are not SLAPP suits, even though protected litigation activity features prominently in the factual background"], citing

Chodos v. Cole (2012) 210 Cal.App.4th 692, 702-703 [collecting and discussing cases arising from attorney malpractice and breach of fiduciary duties].)[6]

Because Gilbeau did not carry his burden to show that CCF Holdings's breach of fiduciary duty cause of action arose from protected activity, we need not and do not decide whether CCF Holdings demonstrated a probability of prevailing on the merits.

DISPOSITION

The trial court's order denying the anti-SLAPP motion is affirmed. Costs on appeal are awarded to plaintiffs. (Cal. Rules of Court, rule 8.278(a)(1), (2).)

BUTZ, Acting P. J.

We concur:

MURRAY, J.

HOCH, J.

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6 After briefing in this matter was completed, but prior to oral argument, Gilbeau submitted recent decisional law for our consideration—*Cheveldave v. Tri Palms Unified Owners Assn.* (2018) 27 Cal.App.5th 1202. At oral argument, Gilbeau relied on *Cheveldave* in arguing that the trial court erred in denying his anti-SLAPP motion. In that case, the plaintiff filed a lawsuit challenging the authority of the defendant to enter into a settlement agreement in a separate bankruptcy action. The act complained of in the complaint was the defendant's act in entering into the settlement agreement. (*Cheveldave*, at pp. 1208, 1212.) After discussing a number of issues that the settlement agreement affected before the bankruptcy court and a state appellate court, the Court of Appeal held that the act of entering into the settlement agreement was protected activity under the anti-SLAPP statute, as it constituted a written statement made in connection with an issue under consideration or review by a judicial body. (*Id.* at pp. 1212-1213.) We find Gilbeau's reliance on *Cheveldave* misplaced, as the case is factually distinguishable and clearly inapplicable.